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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1934.

No. 142

NOAH STEWART, *Appellant,*

vs.

ROBERT KEYES, *ET AL., Appellees.*

On Appeal From the Supreme Court of Oklahoma.

BRIEF *for* APPELLEES.

Statement.

This action was commenced by appellant in the District Court of Seminole County, Oklahoma, to recover possession of his alleged undivided interest in the lands involved herein and to quiet title thereto. At the conclusion of the trial in said court the appellees interposed a demurrer to appellant's evidence, and the same was sustained. Thereafter an appeal was taken to the Supreme Court of Oklahoma, and it affirmed the judgment of the trial court. Thereafter appellant appealed to this court.

Motion to Dismiss Appeal.

Appellees filed herein a motion to dismiss this appeal, which they believe should be sustained. Appellees also believe that there is no reason for granting *certiorari* herein. We respectfully invite the court's attention to the aforesaid motion to dismiss and the answer brief in support thereof.

Facts to Be Considered.

At the commencement of the trial in the District Court of Seminole County, Oklahoma, it was stipulated by the parties as follows:

That Lizzie Toney was a full-blood Creek Indian, enrolled opposite Roll No. 8540; that she died intestate in the month of October, 1899; that the lands involved herein were allotted and patented to the heirs of said Lizzie Toney; that the certificate of selection of the allotment was issued January 13, 1902; that the descent of the aforesaid allotment was cast under the Creek law; and that appellant, Noah Stewart, a full-blood Creek, enrolled opposite Roll No. 4478, was a grandson of Lizzie Toney and one of her heirs at law (R. 17, 18).

Appellant's "Exhibit 27" was a certified copy of the complete Enrollment Records in connection with his enrollment as a citizen of the Creek Nation, and the same discloses that he was seven years of age on January 23, 1900, the date of the enrollment (R. 18A, 18B, 18C).

The parties stipulated that the Secretary of the Interior had never made any order removing any restrictions with reference to appellant or the lands involved herein,

but in entering into said stipulation, appellees stated that this was wholly immaterial (R. 19).

The Supreme Court of Oklahoma stated the facts as follows:

> "This is an appeal from a judgment rendered by the District Court of Seminole County in favor of the defendants in error, who were the defendants in the trial court, against the plaintiff in error, who was the plaintiff therein. Hereinafter the parties will be referred to as they appeared in the trial court.
>
> "The plaintiff's original petition was filed on April 11, 1928. The cause of action attempted to be stated therein was based on the allegations *that the appointment of John A. Jacobs as guardian for him was invalid, that the continuation of such guardianship after the plaintiff had reached the age of majority was invalid,* and that the sale of the land in question by the guardian was invalid. Thereafter various amendments were filed.
>
> "Since the controlling issue is whether or not that guardian's deed can be attacked herein, the details of the allegations of the petition and amendments are not stated.
>
> "The record shows that on July 20, 1909, John A. Jacobs was *regularly appointed* guardian of the property of the plaintiff, who, at the time of the appointment, was a minor. It shows that on the 5th day of January, 1914, after the plaintiff had arrived at the age of majority, said John A. Jacobs presented to the county court a resignation as guardian; that the county court found that the plaintiff, a full-blood Indian and of a weak and inferior mind, was unable to properly transact his own business and incompetent to manage his own affairs; that the said John A. Jacobs was a capable person to be continued as guardian of the plaintiff; that, after an examination of the plaintiff, and after a hearing in the presence of the plaintiff, the resigna-

tion of the guardian was not accepted, and it was ordered that the guardianship continue with John A. Jacobs as guardian until the further order of the court. The record does not show the character of notice of that hearing, if any, and it might be presumed that the necessary notice was given before the order was made. However, we are not determining that question herein. The record shows that thereafter the land in question was sold at a guardian's sale and purchased by the defendant Robert Keyes, who entered into possession thereof and who remained in possession thereof at all times thereafter, and under whom the other defendants in this action claimed title to their respective interests in the property in question. That guardian's deed was filed for record on the 12th day of July, 1916. On August 4, 1917, the county court made an order adjudging the plaintiff to be competent and discharging the guardian. There was other evidence pertaining to *other issues* not controlling herein.

"At the conclusion of the evidence on behalf of the plaintiff, the defendants, jointly and severally, demurred thereto on the ground, *among others*, that each and every cause of action asserted by the plaintiff in the case, as shown by the evidence, was barred by the statutes of limitation of the State of Oklahoma and the United States of America. That demurrer was sustained by the trial court, and judgment was rendered dismissing the action with prejudice. From that judgment the plaintiff appealed to this court." (R. 2, 3, italics ours.)

Other Questions Not Decided by the Supreme Court of Oklahoma.

Appellees in the Supreme Court of Oklahoma urged a number of grounds for affirming the judgment of the trial court, in addition to the one decided by the Supreme Court. (See Separate Answer and Cross Petition, R. 6-17, and Opinion of Supreme Court, (R. 2.) Therefore, in the event of an adverse decision by this court, all questions which were not decided by the Supreme Court of Oklahoma will doubtless be reserved for decision by said court.

Laws to Be Considered.

For the convenience of the court, we are setting out in the Appendix hereto the applicable laws pertaining to the selection, allotment and alienation of lands in the Creek Nation, the applicable laws relating to the jurisdiction of the probate courts in the Indian Territory and the State of Oklahoma, the applicable Oklahoma statutes of limitation, and section 2 of the Act of April 12, 1926 (44 Stat. 239).

ARGUMENT and AUTHORITIES.

Appellees contend that the opinion and judgment of the Supreme Court of Oklahoma herein should be affirmed for the following reasons, to-wit:

1. *That since the Act of May 27, 1908 (35 Stat. 312), the inherited lands of a minor or incompetent full-blood Creek Indian have been subject to sale by the guardian of such Indian, through the County Court appointing such guardian, irrespective of the County Court having jurisdiction to settle the estate of the Indian from whom said lands were inherited. Therefore, the County Court of Hughes County, Oklahoma, being the court which appointed John A. Jacobs as guardian of appellant, Noah Stewart, had the power and authority to authorize the sale of appellant's interest in the lands involved herein and to approve the guardian's deed made by such guardian on the 11th day of July, 1916.*

2. *That the guardian's deed which was executed by John A. Jacobs, as guardian of appellant, an incompetent, to the appellee, Robert Keyes, on the 11th day of July, 1916, was and is valid.*

3. *That whether or not the lands involved herein were "restricted", in the hands of appellant, or whether or not he, with respect to said lands, was a "restricted" Indian, the deed which was made by his guardian, John A. Jacobs, on the 11th day of July, 1916, and approved by the County Court of Hughes County, Oklahoma, was subject to the statutes of limitation of the State of Oklahoma, and said statutes had fully run long prior to the Act of April 12, 1926 (44 Stat. 239).*

4. *That the Act of April 12, 1926 (44 Stat. 239), was not applicable to appellant's cause of action attacking the above guardian's deed for the following reasons:* (a) *Appellant was not a "restricted" Indian, nor was his interest in the lands involved herein "restricted", within the meaning and purview of said act; and,* (b) *said act was not intended to apply to a cause of action to which the statutes of limitation of the State of Oklahoma were therefore applicable, and had fully run long prior to the enactment of said act.*

We will now undertake to develop the foregoing contentions, in the order above set out, after which we will undertake to explain and criticize the argument and authorities of appellant.

I.

Since the Act of May 27, 1908 (35 Stat. 312), the inherited lands of a minor or incompetent full-blood Creek Indian have been subject to sale by the guardian of such Indian, through the County Court appointing such guardian, irrespective of the County Court having jurisdiction to settle the estate of the Indian from whom said lands were inherited. Therefore, the County Court of Hughes County, Oklahoma, being the court which appointed John A. Jacobs as guardian of appellant, Noah Stewart, had the power and authority to authorize the sale of appellant's interest in the lands involved herein and to approve the guardian's deed made by such guardian on the 11th day of July, 1916.

We have set out in the Appendix hereto certain laws relating to allotment and alienation of lands of the Five Civilized Tribes, and it will be seen therefrom that Congress at all times presupposed the jurisdiction of the probate

courts in the Indian Territory and the State of Oklahoma to appoint guardians for minors and incompetent Indians, and that such Indians, in matters pertaining to the selection, allotment and alienation of their lands, should act by and through such guardians. This is particularly manifested by section 2 of the Act of May 27, 1908 (35 Stat. 312). And since the admission of Oklahoma to statehood the County Courts thereof have had jurisdiction and power to appoint guardians for minors and incompetents and to authorize and approve sales and conveyances of their real estate. (See article 1, chapter 8; articles 1, 4 and 6 of chapter 9; and article 13 of the Oklahoma Statutes, 1931.)

We do not understand appellant to seriously claim that since the Act of May 27, 1908 (35 Stat. 312), the County Court of Hughes County, Oklahoma, did not have general jurisdiction to appoint a guardian for appellant, upon the ground that he was mentally incompetent, or, having made such appointment, to authorize and approve the sale of appellant's interest in the lands involved herein. His contention, if we understand it, is principally that, due to certain irregularities, the appointment which was made and the sale which was authorized and approved were invalid. In any event, the decision of this court in the case of *Harris, et al.*, v. *Bell, et al.*, 254 U. S. 103, 65 L. ed. 159, conclusively establishes that the County Court of Hughes County, Oklahoma, did have general jurisdiction to appoint a guardian for appellant, upon the ground that he was an incompetent, and to authorize and approve the sale by said guardian of appellant's interest in the lands involved herein, irrespective of the County Court having jurisdiction to settle the estate of appellant's grandmother, from whom he inherited

such interest. The fifth paragraph of the syllabus to that case is as follows:

"Adult heirs only must be regarded as comprehended by the proviso in the Act of May 27, 1908, section 9, that no conveyance of any interest of any full-blood Indian heir shall be valid unless approved by the court having jurisdiction of the settlement of the estate of a deceased allottee, in view of the provision of section 6 of such act, subjecting the persons and property of minor Indians to the jurisdiction of the Oklahoma probate courts, and hence a guardian's conveyance for minor heirs of a deceased allottee, directed and approved by the court having control of the guardianship, need not also be approved by the court having jurisdiction of the deceased allottee's estate."

In the course of the opinion in said case this court said:

"Of course, the purpose in requiring any approval is to safeguard the interests of the full-blood Indian heir. Where he is a minor, he can convey only through a guardian; and no court is in a better situation to appreciate and safeguard his interests than the one wherein the guardianship is pending. Besides, as a general rule, a guardianship carries with it exclusive power to direct the guardianship and to supervise the management and disposal of the ward's property. It is so in Oklahoma. This rule is so widely recognized and so well grounded in reason that a purpose to depart from it ought not to be assumed unless manifested by some very clear or explicit provision. The Act of 1908 contains no manifestation of such a purpose outside the proviso in section 9. That proviso seems broad, but so is the provision in section 6, subjecting the persons and property of minor Indians to local guardianship. As both are in the same act, they evidently were intended to operate harmoniously, and should be construed accordingly. The proviso does not mention minors under guardianship; and to regard its general words

as including them will either take all supervision of the sale of their interest in inherited lands from the court in which the guardianship is pending, or subject that court's action to the approval of another court of the same rank. In either event, conflict and confusion will almost certainly ensue and be detrimental to the minor heirs. *But, if the proviso be regarded, as well it may, as referring to heirs not under guardianship—in other words, to adult heirs—the two provisions will operate in entire harmony,* and all full-blood heirs will receive the measure of protection intended. We think this is the true construction." (Italics ours.)

The foregoing is equally applicable to a full-blood heir who happens to be *non compos mentis,* and thus we are safe in saying that both minor and mentally incompetent full-blood heirs, with respect to their inherited lands, are in the same category as Indian minors of less than half blood, with respect to their allotted lands.

Aside from the foregoing there are only two positions that can be taken, either *(1)* that a full-blood incompetent heir can, without any guardian being appointed, execute a deed to his inherited lands and have the same approved in accordance with the proviso in section 9 of the Act of May 27, 1908 (35 Stat. 312), or *(2)* such Indian cannot in any way dispose of his inherited lands, there being no specific provision therefor. But each of these alternatives is too unreasonable to justify the thought of any court adopting it.

Even in the absence of any provision as to how a mentally incompetent full-blood heir could sell his inherited lands, this court, inasmuch as section 9 of the Act of May 27, 1908 (35 Stat. 312), removed all restrictions therefrom, would hold that the same were alienable according to the state laws re-

lating to incompetents. For, in *Kendall* v. *Ewert*, 259 U. S. 139, 66 L. ed. 862, this court held:

> "There being no congessional legislation providing for the administration of the personal property of an intestate Indian, the state law is applicable."

In the case of *Lytle* v. *Fulotka*, 106 Okl. 86, 233 Pac. 456, in an opinion by a Supreme Court Commissioner, it was specifically held that subsequent to the Act of May 27, 1908 (35 Stat. 312), the probate courts of Oklahoma had jurisdiction to appoint guardians for incompetent adult full-blood Indians and to approve sales of their inherited lands.

Now, having reached the conclusion that a guardian may be appointed for a full-blood incompetent heir and that such guardian may sell the inherited lands of such heir, through the County Court appointing him, all in accordance with the laws of the State of Oklahoma, irrespective of the County Court having jurisdiction to settle the estate of the Indian from whom such heir inherited said lands, it necessarily follows that this court will follow the construction which the Supreme Court of Oklahoma has placed upon its statutes dealing with the appointment of guardians for incompetents and the sale of the lands of such incompetents, together with the effect of such proceedings. That this is true was established by this court in the case of *Bunch* v. *Cole, et al.*, 263 U. S. 250, 68 L. ed. 290, in which it was held:

> "The Supreme Court of the United States will, in dealing with the effect of a state statute, treat it as being intended to operate as the highest court of the state had construed it."

Likewise, in the case of *Joines* v. *Patterson, et al.*, 274 U. S. 544, 71 L. ed. 1194, this court held:

> "The extension over Indian Territory of the laws of Arkansas carried the settled constructions placed upon them by the courts of that state, and as so construed they have become in effect laws of the United States."

II.

The guardian's deed which was executed by John A. Jacobs, as guardian of appellant, an incompetent, to the appellee, Robert Keyes, on the 11th day of July, 1916, was and is valid.

The opinion of the Supreme Court of Oklahoma clearly discloses that the sole ground upon which appellant contended that the guardian's sale and deed involved herein were void was that, although John A. Jacobs was "regularly appointed guardian" of appellant, as a minor, the continuation of such guardian after appellant "had reached the age of majority was invalid" (R. 2).

The only case we have been able to find that involves this identical question is that of *Mullen* v. *Glass, et al.*, 43 Okl. 549, 143 Pac. 679, which is a practically identical case, and it was there held that such appointment was valid. The first paragraph of the syllabus to that case is as follows:

> "The guardianship of a minor incompetent does not terminate by operation of law upon such minor attaining majority. Section 3339, Rev. Laws 1910."

The foregoing case was decided on the 13th day of October, 1914, and, insofar as we have been able to ascertain, it has never been, either directly or indirectly, modified or

overruled, and we, therefore, reiterate that it is conclusive of the proposition that the County Court of Hughes County, Oklahoma, had jurisdiction, power and authority to continue John A. Jacobs as guardian of appellant, although he had arrived at the age of majority, on the ground and for the reason that he was an incompetent, that is, mentally incompetent.

As stated under the preceding proposition, this court will follow the construction which the Supreme Court of Oklahoma has placed upon its statutes dealing with the appointment of guardians for minors and incompetents and the sale of their lands, together with the effect of such proceedings.

In the case of *Bunch* v. *Cole, et al.*, 263 U. S. 250, 68 L. ed. 290, it was held:

> "The Supreme Court of the United States will, in dealing with the effect of a state statute, treat it as being intended to operate as the highest court of the state had construed it."

Likewise, in the case of *Joines* v. *Patterson, et al.*, 274 U. S. 544, 71 L. ed. 1194, this court held:

> "The extension over Indian Territory of the laws of Arkansas carried the settled constructions placed upon them by the courts of that state, and as so construed they have become in effect laws of the United States."

Whatever this court, or anyone else, may now think about the case of *Mullen* v. *Glass, et al., supra*, there can be no question that appellees, inasmuch as they purchased their respective interests in the lands involved herein subsequent to the decision in said case, had a perfect right to rely thereon and can now invoke the same as a rule of property. That

this is true is clear from the somewhat recent case of *Harness* v. *Myers*, 143 Okl. 147, 288 Pac. 285, in which it was held:

"The true rule is to give a change of judicial construction, in respect to a statute, the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive."

In the course of the opinion in said case the court said:

"In the case of *Douglass* v. *Pike County*, 101 U. S. 677, 687, 25 L. ed. 968, Mr. Chief Justice WAITE, speaking for the Supreme Court of the United States, said: '* * * The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.'

"We hold that since the appointment of the guardian was in compliance with the statute, at the time it was made, the fact that at a later date this court gave a different construction to the statute could not affect rights acquired by the purchaser at the guardian's sale, and that all rights accruing to the parties under the law as it existed previous to the subsequent construction of the statute by this court in this case on its former appeal, cannot be disturbed. In other words, the construction placed by the court on the statute is not retroactive, but prospective, and, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of legislative enactment.

"Since the sale was made and the guardian was appointed in accordance with the law, as it existed at the time the sale was made and the guardian was appointed, the plaintiff cannot recover herein on the ground that the appointment of the guardian was void."

To the same effect see the following Oklahoma cases: *Sarber* v. *Marland Oil Co.*, 147 Okl. 257, 296 Pac. 473; and *Weston* v. *Poland*, 48 F. (2d) 738.

In the case of *Truskett, et al.*, v. *Closser*, 236 U. S. 223, 59 L. ed. 549, involving a similar situation, it was said:

"The construction has become a rule of property in the state, and we should be disposed to accept it as such, even if we had doubts of the construction of the Act of May 27, 1908. *Reynolds* v. *Fewell*, 236 U. S. 58, *ante*, 465, 35 Sup. Ct. Rep. 230."

III.

Whether or not the lands involved herein were "restricted," in the hands of appellant, or whether or not he, with respect to said lands, was a "restricted" Indian, the deed which was made by his guardian, John A. Jacobs, on the 11th day of July, 1916, and approved by the County Court of Hughes County, Oklahoma, was subject to the statutes of limitations of the State of Oklahoma, and said statutes had fully run long prior to the Act of April 12, 1926 (44 Stat. 239).

The record herein discloses that John A. Jacobs, as guardian of the appellant, as an incompetent, on the 11th day of July, 1916, made, executed, acknowledged and delivered to appellee, Robert Keyes, his guardian's deed covering appellant's interest in the lands involved herein, and said deed was filed for record and recorded in the office of

the County Clerk of Seminole County, Oklahoma, on the 12th day of July, 1916. That immediately upon the execution of said deed Robert Keyes went into possession of said lands, and that he and those claiming under him have remained continuously in possession thereof thereafter. That on the 4th day of August, 1917, the County Court of Hughes County, Oklahoma, adjudged appellant to be competent and discharged his guardian. That the case at bar was commenced on the 11th day of April, 1928. And that at the time of the commencement of said action appellant, according to the Enrollment Records, was more than thirty-four years of age (R. 2, 3, 18B).

Applying the Oklahoma statutes of limitations referred to in the opinion of the Supreme Court of Oklahoma (R. 3) to the above facts, there is no escape from the conclusion that appellant's action attacking the above described guardian's deed was barred approximately seven years prior to the commencement thereof, or approximately five years prior to the Act of April 12, 1926 (44 Stat. 239).

There are three lines of authorities which support the instant contention, to-wit:

(1) The federal cases holding that, irrespective of the Act of April 12, 1926 (44 Stat. 239), the Oklahoma statutes of limitations run against the approved deed of a full-blood Indian heir, not under guardianship, covering the inherited lands of such heir;

(2) The cases holding that, irrespective of the Act of April 12, 1926 (44 Stat. 239), the Oklahoma statutes of limitations run against the sale of the inherited lands of a full-blood Indian heir, under guardianship, by the guardian of such heir, through the County Court appointing the guardian;

(3) The cases, both federal and state, holding that, irrespective of the Act of April 12, 1926 (44 Stat. 239), the Oklahoma statutes of limitations run against the sale of the lands of an Indian minor of less than half blood by the guardian of such minor; and

(4) The cases, both federal and state, holding that the Oklahoma statutes of limitations run against a void as well as a voidable guardian's sale and deed.

The first line of authorities above referred to, to the effect that, irrespective of the Act of April 12, 1926 (44 Stat. 239), the Oklahoma statutes of limitations run against the approved deed of a full-blood Indian heir, not under guardianship, covering the inherited lands of such heir, is illustrated by the case of *Harjo, et al.*, v. *Empire Gas & Fuel Co.*, 28 F. (2d) (8 C. C. A.) 596, in which it was held:

> "Right of Indians to have regularly approved deed set aside on the ground of fraud could be lost by laches or statute of limitations in the same manner as in the case of white persons."

In that case, Jimpka, Milsey and Molly Harjo, full-blood Seminole Indians, having inherited the allotment of one Sanko, a full-blood Seminole Indian, executed a deed therefor to C. W. Oliver. This deed was duly approved by the County Court of Seminole County, Oklahoma, which had jurisdiction of the estate of Sanko. However, it was claimed by Jimpka, Milsey and Molly that said deed was obtained through fraud, to which claim the defense of laches and the statute of limitations was interposed. In the course of the opinion in the case Judge KENYON said:

> "The deed being approved, as provided by law, the Indians as to the question of setting the same aside on

the ground of fraud were in no different position than a white person would be, and the right to attack the deed for fraud could be lost by laches or the statute of limitations. *Schrimpscher* v. *Stockton*, 183 U. S. 290, 22 S. Ct. 107, 46 L. ed. 203; *Felix* v. *Patrick*, 145 U. S. 317, 12 Sup. Ct. 862, 36 L. ed. 719. This is not a situation where a transfer of Indian lands is void because of violation of government restrictions. Hence it does not present an attempt to circumvent the federal statutes by divesting title by a stipulation in court. We see no reason why the claim of the Indians in the District Court of Seminole County that the deed had been secured by fraud could not be settled and waived by the attorneys for the government authoritatively representing said Indians in the litigation."

To the same effect is the case of *Conner* v. *Cornell*, 32 F. (2d) 581, in which the Eighth Circuit Court of Appeals applied the law of estoppel by a judgment of dismissal to an attempted attack upon an approved conveyance made by certain full-blood Indians after the Act of May 27, 1908 (35 Stat. 312), of their inherited interest in the allotment of a deceased Indian.

Bearing in mind that in the case at bar we are not dealing with the individual allotment of the appellant, but are dealing with his inherited interest in the allotment of his grandmother, Lizzie Toney, and that the only attack that the appellant makes upon the guardian's deed involved herein is that the appointment of his guardian was irregular, the two above cases are particularly applicable. Appellant does not seriously contend that the County Court of Hughes County, Oklahoma, did not have general jurisdiction to adjudge that he was mentally incompetent, to appoint a guardian for his person and estate or to authorize and approve the sale of his inherited interest in the lands involved

herein. He principally claims that the proceedings in connection with the appointment of John A. Jacobs, as guardian of his person and estate, were so irregular as to be void.

If we were dealing with the plaintiff's own allotment, we would be confronted with an entirely different question.

Where an Indian's allotment, or his interest in an inherited allotment, is sold in the manner authorized and prescribed by an Act of Congress, whether the sale be by the Indian himself or by his guardian, what good reason exists for saying that, merely because there were some irregularities in the proceedings, the statutes of limitations are not applicable thereto? We cannot conceive of any. If the appellant had been mentally competent and not under guardianship, he could have executed a deed covering his inherited interest in the lands involved herein and upon the approval thereof by the County Court having jurisdiction to settle the estate of his grandmother, Lizzie Toney, said deed would have been good and valid. As it was, he was under guardianship and the deed involved herein was necessarily executed by his guardian, but nevertheless and in spite of any irregularities in the appointment of his guardian, he received the same supervision and protection that he would have received if he had not been under guardianship and had executed the deed himself. In fact, he received more, for the reason that under the sale proceedings involved herein his interest in the lands involved herein was appraised and advertised for sale and sold to the highest bidder, which would not have been the case had he not been under guardianship.

In this connection we would call attention to the cases of *Schrimpscher, et al.*, v. *Stockton, et al.*, 183 U. S. 290, 46

L. ed. 203, and *Felix, et al.*, v. *Patrick, et al.*, 145 U. S. 317, 36 L. ed. 719.

Schrimpscher, et al., v. *Stockton, et al., supra*, was an action to recover lands allotted to Carey Rodgers, an incompetent Wyandotte Indian, and conveyed by him to the defendants. Said lands were allotted under a treaty, which provided for the issuance of patents in fee simple to incompetent Indians of the Wyandotte Nation, subject to the condition that such lands should not be sold or alienated for a period of five years and not then without the express consent of the President of the United States. After the issuance of said patent the allottee executed his deed to the defendants, which was not approved by the President. Subsequently, a treaty was ratified, which provided that all restrictions upon the sale of lands patented to incompetent Wyandotte Indians under the Treaty of 1855, should be removed, "but that no sale of lands heretofore assigned to orphans or incompetents shall be made under decree of any court, or otherwise, for or on account of any claim, judgment, execution or order or for taxes until voluntarily sold by the patentee or his or her heirs *with the approval of the Secretary of the Interior.*" In said case this court held:

> "Conceding that so long as Indians maintain their tribal relations they are not chargeable with laches or failure to assert their claims within the time prescribed by statute, they lose such immunity when their relations with their tribe are dissolved by accepting allotments of land in severalty under a treaty which provides that the organization and relation of such Indians with the United States as an Indian tribe shall be dissolved and terminated on the ratification of such treaty, and that such Indians shall be deemed to be citizens of the United States, and entitled to all rights, privileges, and immunities as such."

In the body of the opinion the court said:

"No action was ever taken under the 3d clause to procure a confirmation by the Secretary of the Interior of the deed by Rodgers of November 15, 1864, so that, at the time the treaty of 1868 was ratified, the possession of the lands was in the defendants or their grantors holding adversely to the heirs of Rodgers, but the title still remained in such heirs by reason of the fact that his deed to Cooper and Stockton was void, and no proceeding had been taken under the 3d clause of article XV, to confirm or validate it. But although the treaty of 1855 and the patent to Rodgers had expressly provided that there should be no alienation by the grantee or his heirs, the treaty of 1868, which took effect after his death, removed all restrictions upon alienations which should thereafter be made, either by the incompetent grantee Rodgers or his heirs, who thereafter held an alienable title, and were bound to assert such title within the time specified by the statute of limitations, although no title could be gained by adverse possession so long as the land continued to be inalienable by Rodgers and his heirs. *McGannon* v. *Straightlegs*, 32 Kan. 524, 4 Pac. 1042; *Sheldon* v. *Donohoe*, 40 Kan. 346, 19 Pac. 901."

In *Felix, et al.*, v. *Patrick, et al., supra*, this court held:

"Where a suit to establish the equitable title to land was brought twenty-seven years after the legal title was wrongfully acquired by defendant, such equitable relief will be denied on the ground of laches; that the plaintiffs are members of an Indian nation is not sufficient excuse for the laches."

In said case, the government, in 1857, issued scrip to Sophia Felix, a half-blood Sioux Indian, which entitled her to locate 480 acres of land. The act under which the said scrip was issued expressly provided that no transfer or conveyance thereof should be valid. Thereafter Sophia Felix

issued a power of attorney to some unknown party to locate 120 acres of land and at the same time executed in blank a quit-claim deed. Said scrip came into the hands of the defendant, Patrick, and he located said land in the name of Sophia Felix and inserted his name as grantee in the quit-claim deed. The action was filed by the heirs of Sophia Felix to recover said 120 acres of land, approximately twenty-seven years after the legal title was acquired by Patrick. In holding that the plaintiffs were estopped to assert equitable relief, Mr. Justice Brown said that the device of a blank power of attorney and quit-claim deed were doubtlessly resorted to for the purpose of evading the provisions of the Act of Congress to the effect that no transfer or conveyance of the scrip issued thereunder should be valid, and that in making said scrip non-assignable, Congress in effect imposed a restriction upon the alienation of the lands assigned thereunder.

The second line of authorities above referred to, to the effect that, irrespective of the Act of April 12, 1926 (44 Stat. 239), the Oklahoma statutes of limitations run against the sale of the inherited lands of a full-blood Indian heir, under guardianship, by the guardian of such heir, through the County Court appointing the guardian, is illustrated by the case of *Dierks, et al.*, v. *Isaac, et al.*, 114 Okl. 158, 244 Pac. 750. In that case William Isaac, as guardian of Jim and Leila Isaac, who were minor full-blood Choctow Indians, undertook to sell the inherited interest of said minors in and to the allotment of Sadie Isaac, the full-blood Indian sister of said minors. The sale was through the County Court of Atoka County, Oklahoma, and the guardian's deed was executed, acknowledged, delivered and recorded on the 28th day of May, 1909, and the purchaser thereupon went into

possession of the lands covered by said deed and remained continuously in such possession thereafter. Jim Isaac became 21 years of age on the 15th of April, 1916, and Leila Isaac became 18 years of age on the 18th of April, 1914. Subsequently, on the 1st of November, 1919, Jim and Leila Isaac commenced their action to recover the involved lands on the theory that the attempted sale thereof by their guardian was void. The defendants interposed the above referred to statutes of limitation, and the court held that notwithstanding the fact that Jim and Leila Isaac were both full-blood Indians, their action was barred. In the course of the opinion in said case, which was delivered by Justice PHELPS, it was said:

"Plaintiffs in error present four propositions upon which they base their right to have the judgment of the District Court reversed, only two of which are necessary for us to consider in determining the rights of the parties herein.

"First, they claim that plaintiffs are barred from filing and prosecuting their action to recover the real estate in question, for the reason that more than three years elapsed after they arrived at their majority and their guardian was discharged before they commenced the proceedings to recover the land, and cite section 184, Comp. Stats. 1921, which reads as follows:

'Any person entitled to bring an action for the recovery of real property, who may be under any legal disability when the cause of action accrues, may bring his action within two years after the disability is removed.'

"Also section 1496, Comp. Stats. 1921, which reads as follows:

'No action for the recovery of any estate, sold by a guardian, can be maintained by the ward, or

by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof.'

"In *Dodson* v. *Middleton*, 135 P. 368, 38 Okl. 763, this court had this question under consideration when it used the following language:

'The trial court found that at the time the Probate Court of Logan County issued letters of guardianship and ordered the sale of the land by the guardian, said court was without jurisdiction, because defendants were then residents of Kingfisher County, and upon this ground rendered a judgment in favor of defendants for the relief prayed for in their cross petition. The facts established by the evidence are substantially the same as the foregoing allegations of the pleadings, except that it is shown by the evidence that more than five years had elapsed since the recording of the guardian's deed prior to the institution of defendants' action upon their cross petition, and more than two years had elapsed after defendant Hannah Middleton had become of age, and prior to the institution of her action, but that less than two years had elapsed since the attainment of her majority of defendant Lydia Middleton prior to the bringing of her action.'

"And in the syllabus thereof makes use of the following language:

'Where the grantee went into possession of real estate immediately after the purchase thereof by him at a void guardian's sale, and such grantee and those claiming under him remain continuously in possession thereof thereafter, and where the action to recover said real estate is not brought by the minor or his guardian within five years after

> the recording of the deed nor by the minor within two years after his legal disability is removed, an action by such minor for the recovery of said property is barred by sections 5547-5549, Comp. Laws 1909.' (It will be noted that section 5549 of the Statutes of 1909 is now section 184, Comp. Stats. 1921.)

"In *Glory* v. *Bagby*, 188 P. 881, 79 Okl. 155, this court had under consideration this section of the statute, and in the fourth paragraph of the syllabus made use of the following language:

> 'Where a minor's property has been sold at a void or fraudulent guardian's sale, and a guardian's deed executed and filed of record * * * the minor's cause of action is not barred by reason of subdivision 2, section 4655, R. L. 1910, within five years after the recording of the deed, but by virtue of section 4656, R. L. 1910, the minor may begin an action to set aside said sale at any time prior to two years after his legal disability is removed.'

"It will be observed that section 4656, R. L. 1910, is our section 184, Comp. Stat. 1921, and as this construction seems to have been thoroughly adopted by this court, we deem it unnecessary to cite further authorities.

"It is the contention of attorneys for plaintiffs, however, that the plaintiffs, being full-blood Choctaw Indian minors, and having inherited full-blood Indian lands, were restricted Indians as to such inherited lands under the provisions of section 9 of the Act of Congress of May 27, 1908 (35 Stat. 315), which reads as follows:

> 'That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, that no conveyance of any interest of any full-blood Inadian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee.'

"In *Harris, et al.*, v. *Bell, et al.*, 41 S. Ct. 49, 254 U. S. 163, 65 L. ed. 159, the Supreme Court of the United States held that the proviso of section 9 requiring the approval of conveyances by the county court having jurisdiction of the estates of deceased allottees does not apply to full-blood Indian minors, and that the provision of section 6, giving the county court jurisdiction of the person and estate of all Indian minors is the only provision applicable to such Indian minors; and in paragraphs 4 and 5 of the syllabus used the following language:

> 'Lands inherited from a deceased Indian allottee were not included in or affected by the provision in the Act of May 27, 1908, section 6, that no restricted lands of living minors shall be sold or incumbered except by leases authorized by law, by order of the court, or otherwise.
>
> 'Adult heirs only must be regarded as comprehended by the proviso in the Act of May 27, 1908, section 9, that no conveyances of any interest of any full-blood Indian heir shall be valid unless approved by the court having jurisdiction of the settlement of the estate of a deceased allottee, in view of the provision of section 6 of such act, subjecting the persons and property of minor Indians to the jurisdiction of the Oklahoma probate courts, and hence a guardian's conveyance for minor heirs of a deceased allottee, directed and approved by the court having control of the guardianship, need not also be approved by the court having jurisdiction of the deceased allottee's estate.'

"It therefore appears to be well settled that the inherited lands of such heirs were not restricted, and they were not personally restricted as to *such* inherited lands under the proviso of section 9. The only personal restriction upon such full-blood Indian heirs are the same as those upon other *minors* of Oklahoma without regard to Indian blood. This court has

held that the inherited lands of full-blood Indians were freed of all restrictions under the first provision of section 9 of the Act of May 27, 1908, and that, at most, the proviso to that section was a personal restriction upon full-blood Indian heirs and not a restriction upon the land, and that the only restriction imposed by said proviso on full-blood Indian minor heirs was that the probate court should approve the conveyance as that court is required to do in all guardian sales, regardless of the blood of the minor. That being true, it necessarily follows that the statute of limitation that applies to attacks on guardian's sales as to all minors applies to the full-blood minor heirs in relation to their inherited lands.

"In *King* v. *Mitchell*, 171 P. 725, 69 Okl. 207, in paragraphs 5 and 6 of the syllabi, it is said:

> 'Under the provisions of section 9 of the Act of Congress of May 27, 1908 (35 Stat. L. 312), the death of an allottee of the Five Civilized Tribes operated to remove all restrictions upon the alienation of said allottee's land. The first proviso in said section, "that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee," imposed a merely personal restriction on the full-blood Indian heirs. The restrictions thus imposed was simply an incapacity to convey without the approval of the proper county court, similar to the disability of a minor to sell his lands.
>
> 'Lands inherited by full-blood Creek Indian minor from a full-blood Creek allottee are not "restricted lands" within the purview of the proviso in section 6 of the Act of May 27, 1908 (35 Stat. 312), prohibiting the sale or incumbrance of restricted lands of living minors, except by leases authorized by law, by order of the court, or otherwise.'

"This court had this subject under consideration in *Chupco, et al.*, v. *Chapman, et al.*, 170 P. 259, 76 Okl. 201, and in a well-written opinion by Mr. Justice RAINEY, used the following language in paragraphs 5 and 6 of the syllabi:

> 'Under the provisions of section 9 of the Act of Congress of May 27, 1908, the death of an allottee, of the Five Civilized Tribes operated to remove all restrictions upon the alienation of said allottee's lands. The first proviso in said section, "that no conveyance of any interest of any full-blood Indian heir in such lands shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee," imposed a merely personal restriction on the full-blood Indian heirs. The restriction thus imposed was simply an incapacity to convey without the approval of the proper county court, similar to the disability of a minor to sell his lands.
>
> 'Lands inherited by full-blood Creek Indian minors from a full-blood Creek allottee are not "restricted lands" within the purview of the proviso in section 6 of the Act of Congress of May 27, 1908, prohibiting the sale or incumbrance of restricted lands of living minors, except by leases authorized by law, by order of the court, or otherwise.'

"This rule was adhered to by this court in *King* v. *Shults*, 180 Pac. 550, 72 Okl. 254, and followed in *Seiffert* v. *Jones*, 186 P. 472, 187 P. 223, 77 Okl. 204; also *Stewart* v. *Burrows*, 193 P. 881, 80 Okl. 23."

The foregoing case was decided by the Supreme Court of Oklahoma the 14th of July, 1925, and it has never been overruled or modified, and it is clear therefrom that the above referred to statutes of limitations were applicable to the case at bar, notwithstanding the fact that the appellant happens to be a full-blood Creek Indian.

Upon substantially the same state of facts as are involved in the case at bar and as was involved in *Dierks, et al.*, v. *Isaac, et al., supra*, the Supreme Court of Oklahoma followed *Dierks, et al.*, v. *Isaac, et al.*, in the following cases: *Bearhead* v. *American Inv. Co.*, 159 Okl. 84, 10 P. (2d) 1086; *Givens* v. *Jones*, 158 Okl. 124, 12 P. (2d) 892; *Washington* v. *Bartlett, et al.*, 158 Okl. 218, 15 P. (2d) 132; *Deere* v. *Gilmore, et al.*, 158 Okl. 217, 13 P. (2d) 162; *Deere* v. *Gypsy Oil Co.*, 160 Okl. 237, 15 P. (2d) 1086; *Little* v. *Miracle, et al.*, 167 Okl. 388, 29 P. (2d) 970; and the case at bar.

The only difference between any of the foregoing cases and the case at bar is that said cases involved minor full-blood heirs and the case at bar involves an incompetent full-blood heir. This, however, is insufficient to distinguish the cases, because, as we have heretofore said, the construction which this court, in the case of *Harris, et al.*, v. *Bell, et al.*, 254 U. S. 103, 65 L. ed. 159, placed upon sections 6 and 9 of the Act of May 27, 1908 (35 Stat. 312), results in putting an incompetent full-blood heir, with respect to his inherited lands, in the same category as a full-blood minor heir, with respect to his inherited lands.

The third line of authorities above referred to, to the effect that, irrespective of the Act of April 12, 1926 (44 Stat. 239), the Oklahoma statutes of limitations run against the sale of the lands of an Indian minor of less than half blood by the guardian of such minor, is illustrated by the decision of this court in the case of *Joines* v. *Patterson*, 274 U. S. 544, 71 L. ed. 1194, which involved the application of the statutes of limitations to a guardian's deed covering the inherited interests of certain Indian minors of less than half blood in the allotment of their deceased mother. The Su-

preme Court of Oklahoma (114 Okl. 9, 244 Pac. 585), had held, upon several grounds, that the guardian's deed was void and that the statutes of limitations did not run against the same. This court granted a writ of *certiorari* and held:

> "Open, peaceful possession by one purchasing lands at a guardian's sale made under order of a court of competent jurisdiction for the statutory period bars the right of the guardian and his wards to recover possession of the property as heirs of their ancestor."

In the course of its opinion, the court said:

> "Joines went into open, peaceful possession of the allotted lands October 5, 1907, when the following parts of chapter 97, Mansfield's Digest, were in force:
>
> > '*Section 4471.* No person or persons, or their heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments but within seven years next after his, her or their right to commence, have or maintain such suit shall have come, fallen or accrued; and all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments shall be had and sued within seven years next after title or cause of action accrued, and no time after said seven years shall have passed. • • •
> >
> > '*Section 4476.* No action for the recovery of real property, when the plaintiff does not claim title to the lands, shall be brought or maintained when the plaintiff or his testator or intestate, has been five years out of possession.'
>
> "Under the settled construction given to the seven-year statute of limitations by the courts of Arkansas, it began to run against Patterson when Joines took possession. 'So long as a man is in possession of land, claiming title, however wrongfully, and with whatever degree of knowledge that he has no right, so long the real owner is out of possession, in a construc-

tive as well as an actual sense. It is of the nature of the statute of limitation, when applied to civil actions, in effect, to mature a wrong into a right by cutting off the remedy. To warrant its application to ejectment, the books require color of title, by deed or other documental semblance of right in the defendant, only when the defense is founded on a constructive adverse possession. But neither a deed nor any equivalent muniment is necessary, where the possession is indicated by actual occupation, and any other evidence of an adverse claim exists. The muniment is but one circumstance by which to make out an adverse possession.' *Ferguson* v. *Peden*, 33 Ark. 150, 155; *Jacks* v. *Chaffin*, (1879) 34 Ark. 534, 541; *Logan* v. *Jelks*, 34 Ark. 547, 549.

"The Supreme Court of Oklahoma seems definitely to have approved the doctrine that rights of action arising in Indian Territory prior to the statehood remained subject to the Arkansas statute of limitations. *Patterson* v. *Rousney*, 58 Okl. 185, 202, 159 Pac. 636; *Davis* v. *Foley*, 60 Okl. 87, 88, L. R. A. 1917-A, 187, 159 Pac. 646. And see *United States Fidelity & G. Co.* v. *Fidelity Trust Co.*, 49 Okl. 398, 408, 153 Pac. 195; *Sandlin* v. *Barker*, 95 Okl. 113, 117, 218 Pac. 519."

The interests of the Indian minors involved in the above case could only be sold through the proper County Court (section 22, Act April 6, 1906, 34 Stat. 137), and therefore said case, particularly when examined in connection with the opinion of the Supreme Court of Oklahoma, is directly in point with the case at bar.

Likewise, the Supreme Court of Oklahoma in *Glory* v. *Bagby, et al.*, 79 Okl. 155, 188 Pac. 881; *Walker* v. *Hatcher, et al.*, 109 Okl. 283, 231 Pac. 88; *Anicker, et al.*, v. *Harrison, et al.*, 125 Okl. 21, 256 Pac. 39; *Martin, et al.*, v. *Goodman, et al.*, 126 Okl. 34, 258 Pac. 871; *Tiger* v. *Brown, et al.*, 130

Okl. 83, 265 Pac. 124; and doubtless numerous other cases has consistently held that the statutes of limitation run against the sale of the lands of an Indian minor of less than half blood by the guardian of such minor.

The case of *Walker* v. *Hatcher, et al., supra,* involved a probate sale of the allotment of Oscar W. Walker, a minor, enrolled as a Choctaw of one-fourth blood, by the guardian of said minor, and the Supreme Court of Oklahoma held:

> "Where the grantee under a guardian's deed, and those claiming under him, have been in continuous possession of real property since the purchase thereof at a guardian's sale, an action by the ward to recover the property, commenced more than eight years after the guardian's deed was recorded, and more than seven years after the termination of the guardianship, and more than three years after the ward had reached his majority, is barred by subdivision 2, section 183, and by section 1496, Comp. Stat. 1921, and it is not material whether the guardian's deed was valid, voidable or void."

What difference is there in the applicability of the statutes of limitations to a guardian's sale of the allotment of an Indian minor of less than half-blood and a guardian's sale of the inherited interest of a minor or incompetent full-blood heir? We cannot conceive of any. Under the Act of May 27, 1908 (35 Stat. 312), the allotment of a minor Indian of less than half blood can be sold only through the County Courts of Oklahoma, in accordance with the probate laws of said state, and there is the further provision of said act that, irrespective of the laws of Oklahoma, an Indian minor, in case of a female, is one under eighteen years of age, and in case of a male, one under twenty-one years of age, and the Enrollment Records are conclusive as to age. (Sections

1, 3 and 6 of the Act of May 27, 1908, 35 Stat. 312). The construction which this court in the case of *Harris, et al.*, v. *Bell, et al., supra,* places upon the Act of May 27 1908, results in placing the inherited lands of minor and incompetent full-blood heirs in the same category as the allotted lands of Indians of less than half-blood. If anything, the lands of the latter are more restricted than those of the former. Therefore, it would seem that the statutes of limitations are just as applicable to the probate sales of the inherited interests of minor and incompetent full-blood heirs as to the probate sales of the lands of Indians of less than half blood. And we have never heard it even intimated that the statutes of limitations were not applicable to the latter class of sales.

The fourth line of authorities above referred to, to the effect that the Oklahoma statutes of limitations run against a void as well as a voidable guardian's sale and deed, is illustrated by the decision in the case of *Dodson* v. *Middleton,* 38 Okl. 763, 135 Pac. 368, in which it was held:

> "Where the grantee went into possession of real estate immediately after the purchase thereof by him at a void guardian's sale, and such grantee and those claiming under him remain continuously in possession thereof thereafter, and where the action to recover said real estate is not brought by the minor or his guardian within five years after the recording of the deed, nor by the minor within two years after his legal disability is removed, an action by such minor for the recovery of said property is barred by sections 5547-5549, Comp. Laws 1909."

The decision of this court in the case of *Joines* v. *Pattersan, supra,* is to the same effect.

The case of *Dodson* v. *Middleton, et al., supra,* was decided by the Supreme Court of Oklahoma in 1913. Since that time that court has consistently held that the Oklahoma statutes of limitations apply to a void as well as a voidable guardian's sale. See *Glory* v. *Bagby*, 79 Okl. 155, 188 Pac. 881; *Wray* v. *Howard*, 79 Okl. 223, 192 Pac. 584; *Sandlin* v. *Barker*, 95 Okl. 112, 218 Pac. 519; *Walker* v. *Hatcher*, 109 Okl. 283, 231 Pac. 88; *Dierks, et al.*, v. *Isaac, et al.*, 114 Okl. 158, 244 Pac. 750; *Anicker, et al.*, v. *Harrison, et al.*, 125 Okl. 21, 256 Pac. 39; *Martin* v. *Goodman*, 126 Okl. 34, 258 Pac. 871; *Tiger* v. *Brown*, 130 Okl. 83, 265 Pac. 124; *Bearhead* v. *American Inv. Co.*, 157 Okl. 84, 10 Pac. (2d) 1086; *Givens* v. *Jones*, 158 Okl. 124, 12 P. (2d) 892; *Washington* v. *Bartlett, et al.*, 158 Okl. 218, 13 P. (2d) 132; *Deere* v. *Gilmore*, 158 Okl. 217, 13 P. (2d) 162; *Deere* v. *Gypsy Oil Co.*, 160 Okl. 237, 15 P. (2d) 1086, and the case at bar.

We, therefore, submit that although Noah Stewart was a full-blood Creek Indian, and conceding, for the sake of argument, that the appointment of guardian and probate sale involved herein were absolutely null and void, appellant's action was barred by sections 99, 100 and 1444 of the Oklahoma Statutes, 1931, approximately eight years prior to the commencement thereof, or approximately five years prior to the Act of April 12, 1926 (44 Stat. 239).

We reiterate that Congress, having subjected minor and incompetent full-blood Indians, with respect to their inherited lands, to the County Courts of Oklahoma, this court will follow the construction which the Supreme Court of that state has placed upon its statutes dealing with the appointment of guardians for minors and incompetents and the sale of their lands, together with the effect of such pro-

ceedings. That this is true was established by this court in the case of *Bunch* v. *Cole, et al.*, 263 U. S. 250, 68 L. ed. 290, in which it was held:

> "The Supreme Court of the United States will, in dealing with the effect of a state statute, treat it as being intended to operate as the highest court of the state has construed it."

Likewise, in the case of *Joines* v. *Patterson, et al.*, 274 U. S. 544, 71 L. ed. 1194, this court held:

> "The extension over Indian Territory of the laws of Arkansas carried the settled constructions placed upon them by the courts of that state, and as so construed they have become in effect laws of the United States."

IV.

The Act of April 12, 1926 (44 Stat. 239), was not applicable to appellant's cause of action attacking the above guardian's deed for the following reasons: *(a)* Appellant was not a "restricted" Indian, nor was his interest in the lands involved herein "restricted," within the meaning and purview of said act; and, *(b)* said act was not intended to apply to a cause of action to which the statutes of limitation of the State of Oklahoma were theretofore applicable and had fully run long prior to the enactment of said act.

We have set out in the Appendix hereto section 2 of the above act, but for the purpose of convenience will re-quote it:

> "The statutes of limitations of the State of Oklahoma are hereby made and declared to be applicable and shall have full force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indians, and against all rights and causes of action heretofore accrued or here-

after accruing to any such Indians, or their heirs or grantees, to the same extent and effect and in the same manner as in the case of any other citizen of the State of Oklahoma, and may be pleaded in bar of any action brought by or on behalf of any such Indian, his or her heirs or grantees, either in his own behalf or by the government of the United States, or by any other party for his or her benefit, to the same extent as though such action were brought by or on behalf of any other citizen of said state: *Provided*, that no cause of action which heretofore shall have accrued to any such Indian shall be barred prior to the expiration of a period of two years from and after the approval of this act, even though the full statutory period of limitation shall already have run or shall expire during said two years' period, and any such restricted Indian, if competent to sue, or his guardian, or the United States in his behalf, may sue upon any such cause of action during such two years' period free from any bar of the statutes of limitations."

In five cases, including the case at bar, the Supreme Court of Oklahoma has held in accordance with the above proposition. See, *Tomlin* v. *Roberts, et al.*, 126 Okl. 165, 258 Pac. 1041; *Bearhead* v. *American Inv. Co., et al.*, 157 Okl. 84, 10 P. (2d) 1086; *Deere* v. *Gypsy Oil Co.*, 160 Okl. 237, 15 P. (2d) 1086; *Little* v. *Miracle, et al.*, 167 Okl. 388, 29 P. (2d) 970; and the case at bar, 167 Okl. 531, 30 P. (2d) 875.

In *Bearhead* v. *American Inv. Co., et al., supra*, the court held:

"The proviso of section 9 of the Act of Congress of May 27, 1908 (35 Stat. 312), requiring the approval of conveyance by the county court having jurisdiction of the estates of deceased allottees, does not apply to full-blood Indian minors, and the provision of section 6 giving the county court jurisdiction of the person and

estate of all Indian minors is the only provision applicable to such Indian minors.

"The two-year provision in the Act of Congress of April 12, 1926 (44 Stat. 239), is not applicable to causes of action where the land in controversy is not restricted.

"Lands inherited by full-blood Creek Indian minors from a full-blood Creek allottee are not 'restricted lands' within the purview of the proviso in section 6 of the Act of Congress of May 27, 1908 (35 Stat. 312, 313), prohibiting the sale or incumbrance of restricted lands of living minors, except by leases authorized by law, by order of the court, or otherwise."

In the course of the opinion in said case the court said:

"The sale was confirmed on February 23, 1922. The guardian's deed was executed on March 16, 1922, and filed for record on that date. This action was commenced on October 8, 1928. The action was barred by the provisions of sections 183 and 184, C. O. S. 1921. *Dodson* v. *Middleton, et al.*, 38 Okl. 763, 135 P. 368; *Wray* v. *Howard, et al.*, 79 Okl. 223, 192 P. 584; *Walker* v. *Hatcher, et al.*, 109 Okl. 283, 231 P. 88, and *Dierks, et al.*, v. *Isaac, et al.*, 114 Okl. 158, 244 P. 750.

"The plaintiff states in his brief that this action was commenced under the authority of section 2 of the Act of Congress of April 12, 1926 (44 Stat. 239), known as the Hastings-Harreld Act. The two-year provision of that act is not applicable to actions involving land which is not restricted. *Tomlin* v. *Roberts, et al.*, 126 Okl. 165, 258 P. 1041. The land in question is not restricted land within the meaning of section 6 of the Act of Congress of May 27, 1908 (35 Stat. 312, 313); *King* v. *Mitchell, et al.*, 69 Okl. 207, 171 P. 725; *Chupco, et al.*, v. *Chapman, et al.*, 76 Okl. 201, 170 P. 259, and *Dierks* v. *Isaac, supra*."

In the case of *Tomlin* v. *Roberts, et al., supra*, an Indian, whose homestead allotment was restricted, commenced

an action to cancel a deed which she had given to her unrestricted surplus allotment. The defendants contended that the action was barred by the statutes of limitations and the plaintiff contended that even though limitations had matured against her she was a "restricted" Indian, and, her action having been brought within two years of the effective date of the Act of April 12, 1926 (44 Stat. 239), the defendants' contention must fail by virtue of section 2 of said act. But the Supreme Court of Oklahoma said:

> "The land involved is the surplus allotment of the plaintiff. The restrictions on it expired in 1907 and before the Creegan deed was executed. Plaintiff contends that she can maintain this suit for a period of two years after the approval of the act, although the statute of limitations had matured before such approval. We cannot agree with this contention. In the *first* place, there is no allegation in the petition that plaintiff is a restricted Indian within the meaning of this act. It is true that under the law her homestead might be restricted, or restrictions may have been removed from her homestead by the Secretary of the Interior, and may have been sold. In the *second* place, it is clear that the land in controversy has been free from restrictions since 1907, and was free from restrictions when the Creegan deed was executed. For plaintiff to be able to maintain a suit within the additional two-year period above provided for, after limitations had already matured before the passage of the act, it would be necessary for the land in controversy to be 'restricted land'. In passing the act, it was doubtless not the intention of Congress to preclude any Indian who owned restricted land from bringing their suit within the two-year period, where limitations had already ripened. It undoubtedly was the intention to give a two-year period after the approval of the act within which to bring such an action. If not brought within such time, the cause would be forever barred."

Reading the second section of the Act of April 12, 1926 (44 Stat. 239), literally, there is no question but what Mary Tomlin, plaintiff in the foregoing case, was a "restricted Indian", but the Supreme Court of Oklahoma rightly held that since her surplus allotment, the land involved, was unrestricted, she was not a "resticted Indian" within the meaning of said act.

In the case of *Deere* v. *Gypsy Oil Co., supra,* which involved a guardian's sale of the inherited lands of a minor full-blood Indian, the court said:

> "Plaintiff further contends that Congress had the right to extend the time for filing said suit by the Act of Congress, chapter 115, vol. 44, U. S. Stat. 240, of the Sixty-ninth Congress, passed and approved April 12, 1926.
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> "In the case at bar plaintiff was more than 21 years old on April 12, 1919. Under section 1496, C. O. S. 1921, as construed in *Tiger* v. *Brown, supra,* said section is applicable in this case.
>
> "When plaintiff attained his majority, disability to sue terminated, and the statute of limitations began to run from that date, which, under the allegations in the petition, would be April 12, 1919. Under section 1496, he had three years after said date to bring said cause of action, or until April 12, 1922. Upon the expiration of said date, plaintiff's rights were barred by the statute of limitation, and the title of the owner and holder of said land ripened into a good and valid title.
>
> "In connection with the above state of facts, we have carefully considered said act and purpose and intention of Congress in passing the same and interpret and construe said act to mean that an Indian to whom had accrued a cause of action, but upon which said cause the statute of limitation had not run—that

said person could bring a suit thereon within two years from the date of the passage of said act. provided said cause of action was a valid cause of action against which no limitation existed at the time of the passage of said act.

"We further hold that said act intended that, where a cause of action had accrued to an Indian long prior to the passage of said act and the various statutes of limitation of the State of Oklahoma had run against said cause of action, and that the same was barred under the said statutes of limitation, under such circumstances said cause of action was not revived by said Act of Congress; that it was not the intention of Congress to revive dead causes of action by the proviso in said act, but it was the legislative intent to preserve to said persons for a period of two years such causes of action as would mature within the two-year period of time. Thus, where an Indian had a cause of action upon which the statute of limitations would run shortly after the passage of said Act of Congress, said Indian would have two years after the passage of said act to bring suit thereon under the saving clause of the proviso, but said proviso does not apply where the statute of limitations has run. This we consider as the logical and reasonable meaning to be given to the language used in said statute.

"Therefore, when said act was passed, it did not give plaintiff two years to bring said action, because the statute of limitations had expired against his cause of action long prior thereto."

The question of the applicability of the Act of April 12, 1926 (44 Stat. 239), to the case at bar depends in part upon what Congress meant by the words "restricted Indians" as used in section 2 thereof. And said question, at least insofar as the case at bar is concerned, is conclusively answered by the decision of this court in the case of *Harris, et al.*, v. *Bell, et al.*, 254 U. S. 103, 65 L. ed. 159, and a long

line of Oklahoma decisions to the same effect. In *Harris, et al.*, v. *Bell, et al.*, this court said:

> "Section 6 of the Act of 1908 subjects the persons and property of minor allottees to the jurisdiction of the probate courts of the state, and in a proviso says: 'No *restricted lands* of living minors shall be sold or encumbered, except by leases authorized by law, by order of the court or otherwise.' One ground on which the guardian's sale on behalf of the minor heirs, Amos and Elizabeth, is assailed, is that it was in violation of this proviso. But, in our opinion, the provisio does not include or affect *inherited lands*. It refers, as a survey of the act shows, to lands of living minor allottees, and not to lands *inherited from deceased allottee*. Section 9 expressly recognized that the latter may be sold, and this proviso cannot be taken as prescribing the contrary." (Italics ours.)

Thus it is settled that a full-blood minor heir, with respect to his inherited lands, is not a "restricted Indian", nor are such lands "restricted lands", and, of course, the same thing must be true of a full-blood incompetent heir.

Inasmuch as the Act of May 27, 1908 (32 Stat. 312), expressly and specifically authorized the sale of the inherited lands of minor and incompetent full-blood Indians, all of the allotted lands of Indian minors of less than half blood, and the surplus allotments of Indian minors of more than one-half and less than three-fourths blood, by and through the County Courts of the State of Oklahoma, there is no escape from the conclusion that Congress regarded all such lands as "unrestricted" and such Indians, with respect to said lands, as "unrestricted Indians," otherwise the proviso to section 6 of said act would absolutely and unconditionally prevent any such sales. In other words, when Congress in said proviso used the words "restricted lands", it meant lands which

were *inalienable in any way,* except by an order of the Secretary of the Interior removing restrictions or a subsequent Act of Congress, and clearly and unquestionably disclosed that it regarded the lands of minors, of whatever degree of blood and whether allotted or inherited, which it had provided might be sold through the probate courts, as not "restricted lands", and that such Indians, with respect to such lands, were not "restricted Indians."

In *United States* v. *Gypsy Oil Co.*, 10 F. (2d) (8 C. C. A.) 487, the United States filed an action to cancel an oil and gas lease executed by Wilson Clinton, a full-blood minor Creek Indian, covering his inherited lands, because the same was not approved by the Secretary of the Interior, in accordance with the provisions of section 2 of the Act of May 27, 1908 (35 Stat. 312), but was executed by his guardian and approved by the County Court having jurisdiction of his person and estate. Section 2 of the Act of May 27, 1908 (35 Stat. 312), provides as follows:

> "That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or courator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal; *Provided,* that leases of *restricted lands* for oil, gas or other mining purposes, leases of *restricted homesteads* for more than one year, and leases of *restricted lands* for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

The court held that inherited lands were not *restricted* lands within the meaning of section 2 of said act, and that it

was not necessary to have the approval of the Secretary of the Interior on a lease of inherited lands.

In *Bagby* v. *United States*, 60 F. (2d) (10 C. C. A.) 80, the plaintiff, a minor Creek Indian of one-sixteenth blood, sought to recover income taxes assessed and paid in 1918 on royalty and bonus received under a lease of her surplus allotment. Section 1 of the Act of May 27, 1908 (35 Stat. 312), removed all restrictions upon alienation of lands allotted to Indians of less than half blood, but section 6 thereof made the persons and property of all minor allottees, including minor allottees of less than half blood, subject to the jurisdiction of the probate courts of the State of Oklahoma. Section 4 of said act provided that all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of persons other than allottees of the Five Civilized Tribes. In holding that the lands involved were not restricted, Judge LEWIS, speaking for the court, said:

> "So on reading the excerpts from sections 1 and 4 it would seem to be clear that the tax here in question is valid. But appellant relies on sections 2 and 6, contending that she and her allotment are still under restrictions, notwithstanding sections 1 and 4; that her estate is still under the supervising control of the Secretary of the Interior, and that until 1920 she was a minor ward of the United States, subject to its care and protection. That may be conceded, yet if it clearly appears from said act and the Revenue Act 1918 (40 Stat. 1057) that Congress intended to subject her income to the tax, the assessment was not erroneous and illegal. *Goudy* v. *Meath*, 203 U. S. 146, 27 S. Ct. 48, 51 L. ed. 130; *Choteau* v. *Burnet*, 283 U. S. 691, 51 S. Ct. 598, 75 L. ed. 1353. Section 2 prevents application of shorter periods of minority under state statutes and practice.

McNee v. *Whitehead*, (C. C. A.) 253 F. 546; *Barbre* v. *Hood*, (C. C. A.) 228 F. 658; *Truskett* v. *Closser*, 236 U. S. 223, 35 S. Ct. 385, 59 L. ed. 549. *It is a temporary restriction on personal capacity*, and supplants every state rule or law to the contrary, and coupled with section 6 demonstrates a continuing interest in and retention of a supervising care over the minor's estate to the extent therein limited; *but that does not interfere with alienation of the allotment through proceedings in probate when it is to the interest of a minor that a sale be made*, nor the minor's right to sell on reaching majority. *There is nothing in section 6 or other parts of the act expressing an intention to continue the restrictions on alienation* which were removed by section 1 of the act."

In *McNee* v. *Whitehead*, 253 Fed. (8 C. C. A.) 546, the court held:

"Under Act May 27, 1908, Sections 1, 2, 4, 6, 9, relating to restriction on alienation of lands allotted to Indians, and declaring that death of any aliottee removed restrictions, held that on the death of a half-blood allottee and descent of lands to heirs of less than half Indian blood the lands became subject to taxation prior to their sale through the Oklahoma probate court; the provisions as to minority not changing the matter."

In the body of the opinion the court held.

"As regards restrictions upon the alienation of allotted lands and their exemption from taxation, it was the practice of Congress, recognized by repeated decisions of the courts, to make a clear distinction between those lands still held by the original allottees and those acquired from them by inheritance, and that distinction should be borne in mind in the present case. It is conceded here that, if sections 1, 4 and 9 stood alone, the lands in question would be taxable; but it is argued that the definite prescription of ages of minority and the subjection of the lands of minors so defined to the

orders of the local probate courts amount to the imposition of another restriction upon alienation with its accompanying exemption from taxation, notwithstanding the removal of 'all restrictions' in sections 1 and 9. We do not think the argument is sound. Where Congress so unmistakably manifested an intention to remove all restrictions, it would take language more clear than that before us to indicate that it imposed another at the same time. In one sense the definition of minority and the commission of jurisdiction to the probate courts of the state constitute a limitation or restriction but the purpose was to avoid the rules, sometimes loosely applied, of estoppel, waiver, and ratification in respect of the acts of minors and to prevent premature majority by decree of a court or by marriage as provided by state statutes. This was but a recognition and strengthening of the ordinary disabilities of minority in behalf of those of Indian blood, not an exception to the removal of restrictions upon alienation generally."

The case of *Harris, et al.*, v. *Bell, et al., supra,* was decided by this court in 1920, but in 1917 the Supreme Court of Oklahoma, in the case of *Chupco, et al.*, v. *Chapman, et al.*, 76 Okl. 201, 170 Pac. 259, had reached the same conclusion. In that case the court held that lands inherited by a full-blood Creek Indian minor were not "restricted lands", and in the course of an exhaustive opinion said:

"It is clear from the language of section 9 that after the death of an allottee of the Five Civilized Tribes the allottee's land, as such, is not restricted, except that under the terms of the second proviso of said section the homestead of a deceased allottee having one-half or more Indian blood who dies leaving issue surviving born since March 4, 1906, is made inalienable for the use and support of such issue during their life or lives, until April 26, 1931, unless restrictions against alienations are removed therefrom by the Secretary of the Interior.

With the exception of such homesteads, restrictions are not on these inherited lands, but are personal to the full-blood Indian heirs.

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"This reasoning, we think, exactly fits the case at ba By the very terms of section 9 of the act death operated to remove all restrictions on the alienation of said allottee's land. If the heirs, or any of them, are Indians of less than full-blood they are authorized to sell or convey the land so inherited by them without any supervision. The heirs enrolled as full-blood Indians are also authorized to sell or convey their interest in such inherited lands, but the validity of any such conveyance depends upon the approval of the conveyances by the court having jurisdiction of the settlement of the estate of the deceased allottee. Since said restrictions are personal to the full-blood Indians, and do not run with the land, such inherited land in the hands of full-blood Indians is not restricted land within the meaning of the term as found in the proviso of section 6. It necessarily follows that the jurisdiction of the probate court of Hughes County to order and confirm the guardian's sales of the interests of the full-blood minor plaintiffs in the inherited allotments in controversy was not defeated by virtue of said proviso in section 6."

This court denied a petition for *certiorari* in *Chupco, et al.*, v. *Chapman, et al.* (see 247 U. S. 506, 62 L. ed. 1241).

Since the foregoing case was decided it has been the general understanding of lawyers in Oklahoma that minor and incompetent full-blood heirs, with respect to their inherited lands, are not "restricted Indians", and that such lands are not "restricted lands", and said case has been consistently followed. See *Dierks, et al.*, v. *Isaac, et al.*, 114 Okl. 158, 244 Pac. 750; *King* v. *Mitchell*, 69 Okl. 207, 171 Pac. 725; *King* v. *Shults*, 72 Okl. 254, 180 Pac. 550; *Seiffert*

v. *Jones*, 77 Okl. 204, 186 Pac. 872, 187 Pac. 223; and *Stewart* v. *Burrows*, 80 Okl. 23, 193 Pac. 881.

The above decisions had become a rule of property in Oklahoma long prior to the Act of April 12, 1926 (44 Stat. 239), and we assume that this court will be reluctant to construe said act in a manner contrary thereto.

In the case of *Truskett, et al.*, v. *Closser*, 236 U. S. 223, 59 L. ed. 549, involving a similar situation, it was said:

> "The construction has become a rule of property in the state, and we should be disposed to accept it as such, even if we had doubts of the construction of the Act of May 27, 1908. *Reynolds* v. *Fewell*, 236 U. S. 58, *ante*, 465, 35 Sup. Ct. Rep. 230."

In none of the acts relating to the Five Civilized Tribes, until the passage of the act under consideration, have we found where Congress used the words "restricted Indians."

While in a certain technical sense the lands of any Indian, whether allotted or inherited, which can only be sold by guardian and through a particular probate court, are "restricted," generally, where the words "restricted Indians" or "restricted lands" are used, the understanding is that they refer to Indians who cannot alienate at all, or lands which cannot be alienated at all, except by an order of the Secretary of the Interior removing restrictions or an Act of Congress. The lands of every white person, whether a minor or an adult, are restricted because they can only be alienated by complying with statutory requirements, but, except in this technical sense, such lands are never regarded as restricted. We therefore insist that when Congress, in the Act of April 12, 1926 (44 Stat. 239), used the words "restricted Indians", it had in mind, just as it did when in

the proviso of section 6 of the Act of May 27, 1908 (35 Stat. 312), it used the words "restricted lands", Indians who could not alienate at all, except by an order of the Secretary of the Interior removing restrictions or an Act of Congress.

If the position of appellant is correct, there are no "unrestricted lands" or "unrestricted Indians", under the Act of May 27, 1908 (35 Stat. 312), except adult Indians of less than half blood and adult Indians of more than half and less than three-fourths blood, with respect to their surplus allotment, all other Indians being either absolutely unable to alienate or only under some form of supervision. However, this position is hard to reconcile with the evident purpose of said act, which was entitled: "An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and other purposes", with the language of section 1 of said act, that "all lands, including homesteads, of said allottees enrolled as inter-married whites, as Freedmen, and as mixed-blood Indians having less than half blood including minors, shall be free from all restrictions", and, that "all lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-fourths Indian blood shall be free from all restrictions", and with the language of section 9 of said act, "that the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land."

Congress, at the time it enacted the Act of April 12, 1926 (44 Stat. 239), is presumed to have had knowledge of the decision of this court in *Harris, et al.*, v. *Bell, et al.*, *supra*, and the above Oklahoma decisions to the same effect, and it must be inferred that it employed the words "restrict-

ed Indians", in section 2 of said act, in the light of said decisions.

Suppose that section 2 of the Act of April 12, 1926 (44 Stat. 239), had been enacted as a part of the Act of May 27, 1908 (35 Stat. 312). Would not this court then be required to place the same construction upon the words therein, "restricted Indians", as it has placed upon the words, "restricted lands" in section 6 of said Act of May 27, 1908 (35 Stat. 312)?

Although it was the evident purpose of the Act of April 12, 1926 (44 Stat. 239), to put an end to both existing and future controversies in connection with Indian lands, appellant's construction of section 2 of said act would have resulted in opening instead of closing the floodgates of litigation. This, we think, we can clearly demonstrate.

Under appellant's construction, the result would be either *(1)* that prior to April 12, 1926, the statutes of limitations of Oklahoma applied to no Indians, except adult Indians of less than half blood, for, according to his position, all others were restricted, or *(2)* that if said act did apply to any Indians, other than adults of less than half blood, it revived, for at least two years thereafter, every cause of action theretofore accruing to such Indians. Either of these results would, indeed, be revolutionary, in the light of the thousands upon thousands of conveyances, both private and judicial, against which, if there were any questions concerning the validity thereof, it was generally thought, by the courts and lawyers, that the statutes of limitations had fully and effectively run. Thus every minor probate sale, whether of allotted or inherited lands, of which there were thousands, every adult full-blood heir deed, whether ap-

proved by the courts or the Secretary of the Interior, which also ran into the thousands, and probably numerous other conveyances, would have been opened to a new attack, regardless of the amount of time which had expired prior to the Act of April 12, 1926 (44 Stat. 239), and it will be borne in mind that approximately eighteen years had expired between said act and the Act of May 27, 1908 (35 Stat. 312). Most certainly this would be an unreasonable and incongruous result from an act which was intended to terminate and not revive litigation!

If appellant's position is right, we are unable to explain this court's application of the statutes of limitation in *Joines* v. *Patterson, supra,* for undoubtedly the Indians in that case were every bit as "restricted" as appellant.

A few of the conditions which the Act of April 12, 1926 (44 Stat. 239), was intended to remedy were these: Due to the inability to always definitely determine the County Court having jurisdiction to settle the estate of a deceased Indian, there were numerous cases where it was questionable whether or not the deed of a full-blood Indian heir, executed pursuant to section 9 of the Act of May 27, 1908 (35 Stat. 312), had been approved by the proper County Court, and section 1 of the Act of April 12, 1926 (44 Stat. 239), among other things, was intended to terminate all such questions. Then there were numerous conveyances by Indians, which were admittedly in violation of restrictions imposed by Acts of Congress and this and the other federal courts, as well as the Supreme Court of Oklahoma, from the earliest time had consistently held that such conveyances were not subject to any rule of estoppel, including the statutes of limitations. Questions of this character were intended

to be remedied by section 2 of the Act of April 12, 1926 (44 Stat. 239). Then there were many cases where judgments had been rendered against Indians, either as plaintiffs, defendants or interveners, but the courts had uniformly held that such judgments did not bar the United States, and that it could at any time relitigate the questions involved therein. Thus it was a common remark among lawyers in Oklahoma, that an Indian was never precluded by a judgment, unless perchance it happened to be in his favor. Section 3 of the Act of April 12, 1926 (44 Stat. 239), as well as section 2 thereof, was intended to remedy this situation. Congress realized all of the foregoing, and, in enacting the Act of April 12, 1926 (44 Stat. 239), it no doubt entertained the very wise and wholesome thoughts which were expressed by this court in the case of *Wood* v. *Carpenter*, 101 U. S. 135, 25 L. ed. 807, wherein it was said:

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is, itself a conclusive bar. The bane and antidote go together."

For the purpose of analyzing the act under consideration, Indians, with respect to the statutes of limitations, might be classified as follows:

(1) Indians, including minors and incompetents, having a cause of action against which the statutes of limitations were not only applicable, but had fully run prior to said

Act of April 12, 1926 (44 Stat. 239). Appellant, we contend, falls within this class, and we further contend that said act was not intended to have any application to said class of Indians.

(2) Indians, including minors and incompetents, having a cause of action against which the statutes of limitation were applicable, but had not fully run prior to the aforesaid act. As to this class of Indians we likewise contend that said act was not intended to apply.

(3) Indians having a cause of action against which the statutes of limitation were inapplicable prior to the aforesaid Act, but at the date thereof the period of time prescribed by the statutes of limitation, which ordinarily would have been applicable, had fully run. As to this class of Indians there is no doubt but what said Act was intended to apply, but the Indians in this class were given until two years after the effective date of said Act within which to sue. Thus it will be seen that although prior to the aforesaid Act the statutes of limitation were not applicable to this class of Indians, Congress authorized counting the period of time that had expired between the date of the accrual of the Indian's cause of action and said Act. In other words, as to this class of Indians, Congress, in effect, enacted a new statute of limitation of two years and refused to allow such Indians to have the period of time within which to sue which they would normally have had, to-wit, the full period of time provided by the existing statutes of limitation, said period of time to be counted from the date that such statutes of limitation first became applicable.

(4) Indians having a cause of action against which the statutes of limitations were inapplicable prior to the afore-

said act, but at the date thereof the period of time prescribed by the statutes of limitation had not fully run, but would run within two years of the date of said act. What we have said with reference to the preceding class of Indians is applicable to this class of Indians.

(5) Indians having a cause of action against which the statutes of limitations were inapplicable prior to the aforesaid act, but at the date thereof the period of time prescribed by the statutes of limitation had not fully run and would not fully run until more than two years thereafter. What we have said with reference to the second preceding class of Indians is applicable to this class of Indians, except it is our position that this class of Indians would not be barred until the full period of limitation had run, although many lawyers in Oklahoma have taken the position that this class of Indians would likewise be barred at the expiration of two years from the date of the aforesaid act.

Appellant no doubt agrees with what we have said with reference to the third, fourth and fifth of the above classes of Indians and probably with reference to what we have said concerning the second class, but takes issue with us as to the first class, contending as to said first class of Indians, that Congress intended to revive for a period of two years the causes of action which were already dead. But if appellant's position is correct, isn't it somewhat strange that Congress would single out the Indians in the third, fourth and fifth paragraphs of the above classification, and, in a sense, impose a burden upon them, to-wit: allow to be counted against them a period of time which theretofore could not have been counted against them, and then, as to the Indians in the first paragraph of said classification

take nothing from and impose no burden upon them, but on the contrary confer a new right upon them, to-wit: give them an additional two years within which to sue, although their causes of action might have been barred many years before? We apprehend that Congress intended doing no such thing.

It must be admitted that the act under consideration, particularly section 2 thereof, is not skillfully drawn, but we earnestly insist that there is nothing in said section which in any wise indicates that Congress intended to revive any cause of action, to which the statutes of limitation were theretofore applicable and the period of time prescribed thereby had fully run at the date of said act. It is to be noted that in the proviso to said section 2, Congress uses the language:

> "* * * even though the full statutory period of limitation shall already have run or shall expire during said two years' period, * * *"

This is quite different from saying although the statutes of limitation were theretofore applicable and the period prescribed thereby had expired or although the Indian's action had theretofore become fully barred. If Congress had intended to say what appellant contents it did, it is submitted that it could have done so in much more appropriate language than that which it actually used. Addressing itself to a similar situation, this court in the case of *Harris, et al.*, v. *Bell, et al.*, 254 U. S. 103, 65 L. ed. 159, said:

> "Had there been a purpose to cut off action by the Secretary as to conveyances already made, some of which were before him at the time, it is but reasonable to believe that other words aptly expressing that purpose would have been used. The matter hardly would have been left to conjecture or uncertain implication."

Our contention that Congress in the act under consideration did not intend to revive any causes of action, which were already barred, even though the same had existed in favor of "restricted Indians", finds support, if not complete justification, in the following italicized words of section 2 of said act: "The statutes of limitation of the State of Oklahoma are hereby made and declared to be applicable to and shall have full force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indians, and against *all* rights and causes of action heretofore accrued or hereafter accruing to any such Indians or their heirs or grantees, *to the same extent and effect and in the same manner as in the case of any other citizen of the State of Oklahoma,* • • •." Said italicized clause indicates quite clearly that Congress assumed, as was the case, that to some extent the aforesaid statutes of limitation were already applicable, but that to some extent they had never been applicable, and it therefore intended said section 2 to make said statutes applicable to the extent to which they were not theretofore applicable. If Congress had been under the impression that as to all restricted Indians the statutes of limitation had never been applicable, to any extent, it would only have been necessary to have said: "The statutes of limitation of the State of Oklahoma are hereby made applicable to all restricted Indians," without adding the foregoing italicized clause.

The foregoing construction which we contend should be placed upon section 2 of the act under consideration renders said section perfectly reasonable, whereas to follow the language of said section literally renders the same very unreasonable. For instance, if a full-blood Indian, who with respect to all of his allotted lands is unquestionably a "re-

stricted Indian", had sold a farm which he had purchased from his earnings, there is no question but what the statutes of limitation would run against his deed, however defective, but reading the aforesaid section literally, the same revived any and every cause of action which such Indian might have had to attack said sale, although the same had been fully barred many years prior to the passage of said section, because said section says, that "no cause of action" heretofore accruing to a "restricted Indian" shall be barred until two years after the Act of April 12, 1926. Likewise, in the case of *Tomlin* v. *Roberts, et al., supra,* Mary Tomlin was unquestionably a "restricted Indian", because her homestead allotment was absolutely inalienable, but the deed involved in that case covered her surplus allotment, which was absolutely alienable, but construing the aforesaid section literally, it had the effect of giving her an additional two years within which to attack her deed to her surplus allotment. Similarly, in the case by this court of *Joines* v. *Patterson, supra,* the Indians suing, according to appellant's position, were "restricted Indians", but this court held that their action was barred by the statutes of limitation, however, if the aforesaid section 2 is read literally, said Indians would have, by virtue of said section, and in spite of and after the decision of this court, the right to bring a new suit at any time within two years after the Act of April 12, 1926. To further illustrate the unreasonableness of appellant's construction, the Act of March 31, 1902 (32 Stat. 284), provided that where a deed was approved by the Secretary of the Interior covering lands patented to Indians, the statutes of limitation of the states in which such lands were situated should apply thereto, and if said act applied to the approved deed of a full-blood Indian of the

Five Civilized Tribes covering the allotment of such Indian, about which there has been some doubt, and if the Indian's action to attack said deed had been completely barred by said act, prior to the Act of April 12, 1926, nevertheless, a literal construction of section 2 of the Act of April 12, 1926, would revive such cause of action for a period of two years.

The foregoing illustrations demonstrate the unreasonableness of the position of appellant, and we think, force the conclusion that the Act of April 12, 1926, was not intended to apply to any cause of action, even though it be one in favor of a "restricted Indian", which, prior to said act, was subject to the statutes of limitation and was fully and completely barred thereby.

Finally, the construction which appellant seeks to place upon the act under consideration, to-wit: that said act extends the time within which an action may be brought, although the statutes of limitation had theretofore fully barred the same, would render said act invalid, in that it would deprive the appellees of their property without due process of law. 17 R. C. L., section 16, page 674; 37 C. J., section 14, page 697; and *Campbell* v. *Holt*, 115 U. S. 620, 29 L. ed. 483.

In the last of the above authorities, this court said:

> "It may, therefore, very well be held that, in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law. The reason is, that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this

title to plaintiff, would be to deprive him of his property without due process of law."

V.

Criticism of Appellant's Arguments and Authorities.

What we have hereinbefore said answers most of the argument of appellant, and little more need be said.

In the final analysis, appellant's argument is that the Supreme Court of Oklahoma held herein that appellees had acquired the lands involved herein by prescription, and to permit appellent to be divested of his inherited lands in this manner is contrary to the provisions of the Act of May 27, 1908 (35 Stat. 312). In other words, the argument is that appellant was divested of his inherited lands by adverse possession, and nothing more. However, the Supreme Court of Oklahoma never either expressly or in effect held anything of the kind. Furthermore, its previous decisions are such as to justify the belief that it would not have entertained for one moment the contention that the lands involved herein could have been acquired simply by adverse possession and lapse of time. What said court did hold herein is simply that the County Court of Hughes County, Oklahoma, had jurisdiction and power to appoint a guardian for appellant and to approve the sale of his interest in the lands involved herein, and having made an order appointing John A. Jacobs as his guardian, and having approved the deed made by said guardian, and said deed having been recorded and the grantee therein having taken possession thereof, the statutes of limitation of the State of Oklahoma ran against any attack on said deed and had barred such attack prior to the Act of April 12, 1926 (44 Stat. 239), and that

said act did not revive appellant's right to attack said deed. This is all that said court held, and we submit that it is entirely different from holding that appellant's interest in said lands could be acquired solely and exclusively by adverse possession. Without an order appointing a guardian for appellant, and without an approved deed by the court having jurisdiction and power to approve the same, there is not the slightest question but what the Supreme Court of Oklahoma would have held that the statutes of limitation could not be interposed as a defense to any action by appellant to recover possession of said lands. That this is true is overwhelmingly established by numerous of the Oklahoma cases cited in appellant's brief.

Appellant contends that "until recently" the Supreme Court of Oklahoma held that the statutes of limitation were not applicable to an action by a full-blood Indian to recover his inherited lands, and cites many cases in support thereof. However, only one of the cases cited is anything like the case at bar. All of said cases, except *Lytle* v. *Fulotka,* 106 Okl. 86, 233 Pac. 456, involved an attempt to divest the Indian of his lands in contravention of some provision of an Act of Congress. Some were cases where the lands were not alienable at all, others where a sale was attempted through some court other than the County Court, others where title was sought to be divested solely by some judgment, and others where an Indian, who was a minor according to the Enrollment Records, had married or had the rights of majority conferred upon him by some Oklahoma District Court and then, relying upon the Oklahoma statutes to the effect that marriage or a decree of majority rights terminates minority, had made his individual deed, which was not ap-

proved by any court. In all such cases, the Oklahoma Supreme Court has always rightly held that the statutes of limitation were inapplicable. But these cases are as different from the case at bar as day is from night.

The opinion in *Lytle* v. *Fulotka, supra,* was written by a Supreme Court Commissioner, and while it involved a situation similar to the one in the case at bar, the Supreme Court of Oklahoma, in *Dierks* v. *Isaac, et al.,* 114 Okl. 158, 244 Pac. 750, in an opinion by Mr. Justice PHELPS, distinguished said case from one exactly like the case at bar, if it did not overrule the same. (See last two paragraphs of the opinion in *Dierks* v. *Isaac, et al., supra.*) In any event, the second line of authorities under the second preceding subdivision of this brief are subsequent and directly contrary to *Lytle* v. *Fulotka, supra.*

Appellant cites a number of cases in support of his contention that the lands involved herein were "restricted" and that he is, with respect to said lands, a "restricted Indian". However, in none of said cases, except *Kiker* v. *United States,* 63 F. (2d) 957, and *Conner* v. *Cornell,* 32 F. (2d) 581, was there involved any conveyance made by a full-blood Indian, or his guardian, and approved by any probate court, or a judge thereof, subsequent to the Act of May 27, 1908 (35 Stat. 312), of her inherited interest in the allotment of a deceased Indian. Moreover, in none of said cases was any question with respect to the statutes of limitation involved. The *Kiker* case merely sustains the right of the United States to sue for and on behalf of a full-blood Indian, and the *Conner* case, which was decided April 19, 1929 (*certiorari* denied by this court, 280 U. S. 583, 74 L. ed. 632), is a positive authority against appellant's con-

tention that the statutes of limitation were inapplicable to the case at bar. In that case the Eighth Circuit Court of Appeals applied the law of estoppel by a judgment of dismissal to an attempted attack upon an approved conveyance made by certain full-blood Indians after the Act of May 27, 1908 (35 Stat. 312), of their inherited interest in the allotment of a deceased Indian. Furthermore, we have heretofore seen that the same court, in *Harjo* v. *Empire Gas & Fuel Co.*, 28 F. (2d) 596, decided September 21, 1928, specifically held that the statutes of limitation were inapplicable to such a conveyance as is involved herein.

The whole difficulty with the position of appellant is that he refuses to recognize that the County Court of Hughes County, Oklahoma, acting as a federal agency, had full power and authority to appoint a guardian for him and to approve the deed of said guardian to his undivided interest in the lands involved herein, and having done these things, no matter how erroneously, there is nothing in any Act of Congress which militates against applying the statutes of limitation to such deed, nor anything to indicate that after appellant's cause of action, if any, was barred Congress intended to revive the same. If there had been no order appointing a guardian for appellant and no order of the proper County Court approving said guardian's deed, appellant's position would be absolutely sound, and the Supreme Court of Oklahoma would have been the first court to have so held.

Conclusion.

In view of the foregoing, we insist that either our motion to dismiss this appeal and to deny *certiorari* should be sustained or the judgment of the Supreme Court of Oklahoma herein should be affirmed.

Respectfully submitted,

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APPENDIX.

Laws Relating to Allotment and Alienation.

By the Original Creek Agreement, Act of March 1, 1901 (31 Stat. 861), as modified by the Creek Supplemental Agreement, Act of June 30, 1902 (32 Stat. 500), provision was made for the allotment and distribution of the Creek tribal lands and funds among the members of the tribe. An enrollment was to be made to *(a)* all members living on April 1, 1899, *(b)* all children born to members after that date, up to and including July 1, 1900, and living on the latter date, and *(c)* all children born to members after July 1, 1900, up to and including May 25, 1901, and living on the latter date. All who were so enrolled were to share in the allotment and distribution. A provision in the Act of March 3, 1905 (33 Stat. 1071), plainly intended to amend and supplement the earlier acts, authorized the inclusion of all children born between May 25, 1901, and March 4, 1905.

The Original Creek Agreement, Act of March 1, 1901 (31 Stat. 861), provides:

> *(Sec. 4.)* "Allotment for any minor may be selected by his father, mother, or guardian, in the order named, and shall not be sold during his minority. All guardians or curators appointed for minors and *incompetents* shall be citizens.
>
> "Allotments may be selected for prisoners, convicts, and aged and infirm persons by their duly appointed agents, and for *incompetents* by guardians, curators, or suitable persons akin to them, but it shall be the duty of said commission to see that such selections are made for the best interests of such parties.
>
> * * * * * * * *
>
> *(Sec. 28.)* "All citizens who were living on the first day of April, eighteen hundred and ninety-nine,

entitled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek nation, and be allotted and distributed to them accordingly.

* * * * * * * *

(Sec. 35.) "Parents shall be the natural guardians of their children, and shall act for them as such unless a guardian shall have been appointed by a court having jurisdiction; and parents so acting shall not be required to give bond as guardians unless by order of such court, but they, and all other persons having charge of lands, moneys, and other property belonging to minors and *incompetents*, shall be required to make proper accounting therefor in the court having jurisdiction thereof in manner deemed necessary for the preservation of such estates." (Italics ours.)

By section 6 of the Creek Supplemental Agreement, Act of June 30, 1902 (32 Stat. 500), the Arkansas law of descent and distribution was substituted for the Creek law, with a proviso that non-citizen heirs should not inherit unless there were no heirs of Creek descent. Said act further provides:

(Sec. 16.) "* * * Selections of homesteads for minors, prisoners, convicts, *incompetents*, and aged and infirm persons, who cannot select for themselves, may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made for any citizen it shall be the duty of said Commission to make selection for him." (Italics ours.)

The Act of March 3, 1905 (33 Stat. 1048), provides:

"It shall be the duty of the Secretary of the Interior to investigate, or cause to be investigated, any lease of allotted land in the Indian Territory which he has reason to believe has been obtained by fraud, or in violation of the terms of existing agreements with any of the Five Civilized Tribes, and he shall in any such case where, in his opinion, the evidence warrants it, refer the matter to the Attorney General for suit in the proper United States court to cancel the same, and in all cases where it may appear to the court that any lease was obtained by fraud, or in violation of such agreements, judgments shall be rendered canceling the same, upon such terms and conditions as equity may prescribe, and it shall be allowable in cases where all parties in interest consent thereto to modify any lease and to continue the same as modified: *Provided*, no lease made by any administrator, executor, guardian, or curator which has been investigated by and has received the approval of the United States court having jurisdiction of the proceeding shall be subject to suit or proceeding by the Secretary of the Interior or Attorney General: *Provided, further*, no lease made by any administrator, executor, guardian, or curator shall be valid or enforcible without the approval of the court having jurisdiction of the proceeding."

The Act of April 26, 1906 (34 Stat. 137), provides:

(Sec. 5.) "That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effec-

tive, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same; *Provided*, the provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this act."

(Sec. 20.) "That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval; *Provided*, that allotments of minors and *incompetents* may be rented or leased under order of the proper court; *Provided, further*, that all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory." (Italics ours.)

(Sec. 22.) "That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such descedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper

court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

The Act of June 25, 1910 (36 Stat. 855), provides:

(Sec. 32.) "Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued, in pursuance of any tribal agreement or Act of Congress, to a person who had died, or who hereafter dies before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life."

The Act of May 27, 1908 (35 Stat. 312), provides:

(Sec. 1.) "That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as Freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hun-

dred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act. No restrictions of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled, 'An Act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes,' approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

(Sec. 2.) "That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or *incompetent*, for a period not to exceed five years, without the privilege of renewal: *Provided*, that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise; and, *provided, further*, that *the jurisdiction of the probate courts of the State of Oklahoma* over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twen-

ty-one years and all females under the age of eighteen years." (Italics ours.)

(Sec. 6.) "That the persons and property of minor allottees of the Five Civilizes Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. * * *"

(Sec. 9.) "*That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land; Provided*, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee; *Provided, further*, that if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one: but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the lands shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions; *Provided, further*, that the provisions of section twenty-three of the Act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section." (Italics ours.)

The above quoted provisions of the Acts of Congress very clearly indicate that Congress at all times presupposed

the jurisdiction of the probate courts in the Indian Territory and the State of Oklahoma to appoint guardians for minors and incompetent Indians and that such Indians in matters pertaining to the selection, allotment and alienation of their lands should act by and through such guardians. This is particularly manifested by section 2 of the Act of May 27, 1908 (35 Stat. 312).

Laws Relating to Jurisdiction of Probate Courts.

By section 6 of the General Allotment Act, approved February 8, 1887 (24 Stat. 388), as amended by the Act of March 3, 1901 (31 Stat. 868), "every Indian in Indian Territory" was "declared to be a citizen of the United States" and "entitled to all of the rights, privileges and immunities of such citizens."

The Act of March 1, 1889 (25 Stat. 783), provides:

> *(Sec. 31.)* "That certain general laws of the State of Arkansas in force at the close of the session of the general assembly in that state of eighteen hundred and eighty-three, as published in eighteen hundred and eighty-four in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act or with any law of Congress, relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide, that is to say, the provisions of the said general statutes of Arkansas relating to administration, chapter one, and the United States court in the Indian Territory herein referred to shall have and exercise the powers of courts of probate under said laws; to public administrators, chapter two, * * * to guardians, curators, and wards, chapter seventy-three, and said court in the Indian Territory shall appoint guardians and curators; * * * to insane persons and drunkards, chapter eighty-two, and said court in the Indian Terri-

tory shall exercise the powers of the probate courts of Arkansas under this chapter; * * * and wherever in said laws of Arkansas the courts of record of said state are mentioned the said court in the Indian Territory shall be substituted therefor; and wherever the clerks of said courts are mentioned in said laws the clerk of said court in the Indian Territory and his deputies, respectively, shall be substituted therefor; * * *."

The Act of June 7, 1897 (30 Stat. 62), provides:

"That the commission appointed to negotiate with the Five Civilized Tribes in the Indian Territory shall examine and report to Congress whether the Mississippi Choctaws under their treaties are not entitled to all the rights of Choctaw citizenship except an interest in the Choctaw annuities.

"*Provided further,* that on and after January first, eighteen hundred and ninety-eight, the United States courts in said Territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted and all criminal causes for the punishment of any offense committed after January first, eighteen hundred and ninety-eight, by any person in said Territory, * * * and the United States commissioners in said Territory shall have and exercise the powers and jurisdiction already conferred upon them by existing laws of the United States as respects all persons and property in said Territory.

"And the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes; and any citizen of any one of said tribes otherwise qualified who can speak and understand the English language may serve as a juror in any of said courts."

The Act of April 28, 1904 (33 Stat. 573), provides:

> *(Sec. 2.)* "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, whether Indian, Freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the District Courts in said Territory in the settlements of all estates of decedents, the guardianships of minors and *incompetents*, whether Indians, Freedmen, or otherwise. That the sum of twenty thousand dollars is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the payment of salaries of the judges hereby authorized, the same to be immediately available." (Italics ours.)

Oklahoma, with boundaries including Indian Territory, came into the Union November 16, 1907. Thereupon, all laws then in force in the Indian Territory, except insofar as they were locally inapplicable or repugnant to the Oklahoma Constitution, were extended to the new state and the courts of original jurisdiction of said state became the successors of all courts of original jurisdiction in the Indian Territory. And since the admission of Oklahoma to statehood the County Courts thereof have had jurisdiction and power to appoint guardians for minors and incompetents and to authorize both sales and conveyances of their real estate. (See sections 19 and 20, Enabling Act, approved June 16, 1906 (34 Stat. 266), as amended by the Act of March 4, 1907 (34 Stat. 1286); sections 1, 12 and 13 of article VII, and sections 1, 2 and 33 of the Schedule, of the Constitution of Oklahoma; and article I, chapter 8, articles I, IV and VI of chapter 9, and article XIII of the Oklahoma Statutes, 1931.)

Oklahoma Statutes of Limitation.

Sections 99, 100 and 1444 of the Oklahoma Statutes, 1931, are as follows:

(Sec. 99.) "Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no time thereafter:

* * * * * * * *

"*Second.* An action for the recovery of real property sold by executors, administrators or guardians, upon an order or judgment of a court directing such sale, brought by the heirs or devisees of the deceased person, or the ward or his guardian, or any person claiming under any or either of them, by the title acquired after the date of the judgment or order, within five years after the date of the recording of the deed made in pursuance of the sale. * * *"

(Sec. 100.) "Any person entitled to bring an action for the recovery of real property, who may be under any legal disability when the cause of action accrues, may bring this action within two years after the disability is removed."

(Sec. 1444.) "No action for the recovery of any estate, sold by a guardian, can be maintained by the ward, or by any person claiming under him, unless it be commenced within three years next after the termination of the guardianship, or when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues within three years next after the removal thereof."

The Act of April 12, 1926 (44 Stat. 239).

The above act contains three sections. Section 1, among other things, provides:

> "* * * That all conveyances by full-blood Indian heirs heretofore approved by the County Courts shall be deemed and held to conclusively establish the jurisdiction of such courts to approve the same except where more than one such conveyance of the same interest in the same land has been made by the same Indian to different grantees and approved by county courts of different counties prior to the passage of this act, and except that this proviso shall not affect and may not be pleaded in any suit brought before the approval of this act."

Section 2 is as follows:

> "The statutes of limitations of the State of Oklahoma are hereby made and declared to be applicable to and shall have full force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indians, and against all rights and causes of action heretofore accrued or hereafter accruing to any such Indians, or their heirs or grantees, to the same extent and effect and in the same manner as in the case of any other citizen of the State of Oklahoma, and may be pleaded in bar of any action brought by or on behalf of any such Indian, his or her heirs or grantees, either in his own behalf or by the government of the United States, or by any other party for his or her benefit, to the same extent as though such action were brought by or on behalf of any other citizen of said state; *Provided*, that no cause of action which heretofore shall have accrued to any such Indian shall be barred prior to the expiration of a period of two years from and after the approval of this act, even though the full statutory period of limitation shall already have run or shall expire during said

two years' period, and any such restricted Indian, if competent to sue, or his guardian, or the United States in his behalf, may sue upon any such cause of action during such two years' period free from any bar of the statutes of limitations."

Section 3 makes provision for notifying the Superintendent of the Five Civilized Tribes of the pendency of any action in the United States courts in the State of Oklahoma or in the State of Oklahoma "to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervener, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes, or the proceeds, issues, rents, and profits derived from the same," and that the United States may then appear in such action and if the same is pending in a state court remove it to the federal court, where it shall proceed as if filed in such court, and further providing, subject to compliance with said section, that the United States shall be bound by the judgment in such cause "to the same extent as though no Indian land or question were involved."